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**In the Supreme Court
OF THE
United States**

OCTOBER TERM, 1942

No. 276

JOHN GONZALES and JOHN CHIEROTTI,
Petitioners,
vs.
THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

PETITION FOR A REHEARING

By Petitioners After Order Denying Issuance of Writ of
Certiorari to the Supreme Court of the
State of California.

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*To the Honorable Harlan Fiske Stone, Chief Justice
of the United States, and to the Associate Justices
of the Supreme Court of the United States:*

Petitioners above named hereby ask the above Court for a rehearing of their petition for a writ of certiorari to the Supreme Court of the State of California, after an order of this Court denying the same, made and entered on the 12th day of October, 1942.

In so doing, petitioners verily believe that this Court has not given full consideration to the importance of the constitutional question involved and probably has been misled by certain statements contained in the brief filed by respondent in opposition to the original petition.

1. THE FACTS SURROUNDING THE VIOLATION OF THE CONSTITUTIONAL RIGHT STAND ADMITTED IN THE RECORD.

The factual situation stands uncontradicted in the record and is conceded in respondent's brief (p. 3) as follows:

"* * * two police officers of the City and County of San Francisco, State of California, entered the residential apartment of petitioner Chierotti after the door to the same was opened by the janitor of the apartment house, at the request of the clerk in charge thereof, *without the consent of petitioner Chierotti, and without any warrant, writ or process of any court, and without the consent of the petitioner Chierotti* (pp. 18 and 19 of the Petition herein); that upon entrance to Chierotti's said apartment, the police officers observed a certain black bag and its contents subsequently introduced in evidence in the trial of petitioners; that *petitioners, assuming their right to so object, offered timely and appropriate objections to the introduction of said physical evidence, and all testimony respecting the same and the entrance into Chierotti's apartment and that petitioner Chierotti, assuming his right so to do, made timely and appropriate demand for the suppression and re-*

turn of this physical evidence; and that petitioners have exhausted their remedies respecting these matters in the courts of California." (Emphasis added.)

The black bag and contents was the only evidence rendering in any way sufficient the proof to support the charge.

2. SUMMARY OF GROUNDS ON WHICH PETITIONER SOUGHT ISSUANCE OF THE WRIT.

The petitioner Chierotti, several months prior to trial having moved to suppress all evidence acquired by and testimony relating to the unlawful search and seizure conducted in his residence, contended that his conviction was in violation of the due process clause of the Fourteenth Amendment on the following grounds, to wit:

(a) The right to be secure against unreasonable searches and seizures is a fundamental principle of liberty and justice lying at the base of our civil and political institutions.

Gouled v. United States, 255 U. S. 298, 65 L. ed. 647;

Byars v. United States, 273 U. S. 28, 33, 71 L. ed. 520, 524;

Boyd v. United States, 116 U. S. 616, 630, 29 L. ed. 746;

Go-Bart Importing Co. v. United States, 282 U. S. 344, 75 L. ed. 374, 382;

Weeks v. United States, 232 U. S. 383, 391, 58 L. ed. 652, 655;

Marron v. United States, 275 U. S. 192, 195,
75 L. ed. 231, 236.

(b) Any right which is a fundamental principle of liberty and justice is protected from state action by the Fourteenth Amendment and will be enforced by writ of certiorari issued to the state court by the Supreme Court of the United States.

Powell v. Alabama, 287 U. S. 45, 67, 77 L. ed. 158, 169;

Mooney v. Holohan, 294 U. S. 103, 112, 79 L. ed. 791, 794;

Brown v. Mississippi, 297 U. S. 278, 285, 80 L. ed. 682, 686;

Chambers v. Florida, 309 U. S. 227, 84 L. ed. 716.

(c) The right to be secure against unreasonable search and seizure prohibits the use as evidence, where timely objection has been made, of property or knowledge acquired by such search and seizure.

Olmstead v. United States, 277 U. S. 438, 463, 72 L. ed. 944, 950;

Silverthorne Lumber Co. v. United States, 251 U. S. 382, 64 L. ed. 319;

Weeks v. United States, 232 U. S. 383, 393, 58 L. ed. 652, 656;

Byars v. United States, 273 U. S. 28, 29, 71 L. ed. 520, 522.

(d) The convictions of defendants, being based on evidence acquired as the result of unlawful search and seizure by state officers, timely objection to the use thereof having been made prior to trial, is void

as lacking the essential elements of due process in that the right to be secure against unlawful search and seizure is a fundamental principle of liberty and justice and the use of such evidence violates the safeguard of the due process clause of the Fourteenth Amendment and should be annulled by this court on certiorari.

3. WHERE PROVISIONS OF THE FEDERAL AND A STATE CONSTITUTION ARE IDENTICAL, ADOPTED TO SAFEGUARD THE SAME RIGHTS AND PREVENT OR CORRECT THE SAME EVILS THEIR CONSTRUCTION AND APPLICATION MUST BE THE SAME.

Respondent has laid stress on the fact that Article I, section 19 of the California Constitution, reading as follows:

“The right of the people to be secure in their persons, houses, papers and effects, against unreasonable seizures and searches, shall not be violated; and no warrant shall issue but on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the person and things to be seized.”

can be construed by the Supreme Court of California in any way it sees fit and that such court has construed it as merely prohibiting the unlawful search and seizure, while allowing the fruits thereof to be used as evidence in a criminal trial against the person whose constitutional right has been violated.

That this provision of the California Constitution and the Fourth Amendment to the Federal Constitution were each adopted for the same reasons and

to correct and prevent the same evils can brook no argument. The Supreme Court of California has so stated in *People v. Mayen*, 188 Cal. 237, 249,

“It may be taken for granted that the provisions of our own constitution and those of nearly all the states of the Union against unreasonable searches and seizures, and protecting the citizen from being compelled in any criminal case to be a witness against himself, *have been adopted, in almost the precise words and for the same reason, as in the federal constitution. They are safeguards designed to protect the intimate sanctity of the person and the home from invasion by the state.*”

The adoption of both the State and Federal Constitutional provisions against unlawful searches and seizures having been brought about as the result of the same evils, to correct the same abuses and to accord the same rights they each must be given the same interpretation and effect.

This court has held the law to be as above stated:

“But, as the manifest purpose of the constitutional provisions, both of the states and of the United States, is to prohibit the compelling of testimony of a self-incriminating kind from a party or a witness, *the liberal construction which must be placed upon constitutional provisions for the protection of personal rights would seem to require that the constitutional guaranties however differently worded, should have as far as possible the same interpretations;* and that where the constitution, as in the cases of Massachusetts and New Hampshire, declares that the subject

shall not be ‘compelled to accuse or furnish evidence against himself;’ *such a provision should not have a different interpretation from that which belongs to constitutions like those of the United States and of New York*, which declare that no person shall be ‘compelled in any criminal case to be a witness against himself.’” (Emphasis added.)

Counselman v. Hitchcock, 142 U. S. 547, 584, 35 L. ed. 1110, 1121.

To allow a state to interpret its own constitutional provision in a manner contrary to the parent provision found in the Federal Constitution, *can lead only to confusion and injustice*.

As illustrative of this we need but call attention to recent proceedings held in the federal and state courts of California. On July 16, 1942, a man named Vernon Davis was indicted in the United States District Court for the Northern District of California for the unlawful sale and possession of narcotics, which were procured by federal and state officers as the result of an unlawful search and seizure. Davis moved the District Court for an order suppressing and excluding the narcotics as evidence and the district judge not only granted the motion but ordered the indictment dismissed, as having been founded upon such unlawfully acquired evidence. Immediately on the dismissal of the indictment Davis was arrested by state officers and charged with the unlawful sale and possession of the same narcotics under the state law. He moved the state court to suppress

and exclude the evidence and such motion, under the authority of the present case, was denied. Here is a situation where identically the same constitutional right is involved. Such right is upheld by one court and denied by another.

4. THE DIVERSITY OF DECISION AMONG THE SEVERAL STATES, CONSTRUING THE CONSTITUTIONAL RIGHT INVOLVED, NECESSITATES ACTION BY THIS COURT TO THE END THAT THE OPERATION OF THE RIGHT BE UNIFORM THROUGHOUT THE UNION.

Cornelius, in *The Law of Search and Seizure* (1930), sec. 7, p. 36 et seq., states that the courts of last resort of *nineteen states have adopted the Federal doctrine*, that the courts of *twenty-three states have rejected such doctrine*, while in the remaining states the question has been reserved for future decision.

It is the object of our system of government and the aim of all judicial function that equality before the law be maintained inviolate and that personal rights, whether created by statute or embodied in Constitutions, be uniform in their operation and equal in their application.

The decisions of this court which we have cited are uniform to the effect that the right to be secure against unlawful search and seizure is a fundamental principle of liberty and justice lying at the base of our institutions and incorporated in our Constitution to correct the evils of the day and to insure for all

time to come that such evils shall never again be allowed to arise in this land of liberty and justice.

The original States of the Union insisted on this great right being specifically announced and preserved. In after years, each new state on being admitted to the Union acknowledged this right and its importance, by accepting the Constitution of the United States as the supreme law of the land and by embodying in its own organic law an identical provision. In so acknowledging, accepting and re-promulgating this great right, each state undoubtedly intended that it would be interpreted, applied and enforced in all its pristine vigor, and that no action by federal or state governmental agency should result in paying word tribute to the right while denying adequate means wherewith to enjoy and preserve the right.

To state, in one breath, that the right is paramount and then to hold in another that property or knowledge acquired by government officials in violation of the right can be used against an accused, is to reduce the right to a mere form of words.

Yet, in the years that followed the admission of the states into the Union, the courts of many of these states have effectually denied this right while acknowledging, with empty words, its existence.

Either the right does or does not exist. If it exists, then it must be enforced and protected and this can only be done by construing the right so that every citizen is protected from such unlawful and arbitrary

action by state governments and denying to the states the right to avail themselves of their own wrongful acts.

In perilous times, such as we are now living in, no greater duty devolves upon this court than the preservation of the rights which our forefathers died to protect. This Nation was born as the result of English governmental oppression. Then we fought to be free from such oppression, now we are fighting that such oppression shall not again be visited upon us by dictator nations. The rights that were of such importance then are of equal importance today. No question of expediency can justify encroachment on any of these rights. A war to preserve them cannot be won by their present denial.

The diversity of decision among the states requires that this court consider the question involved and announced a rule whereby the right be uniformly interpreted and enforced to its fullest throughout each state of the Nation.

5. **RESPECTABLE FEDERAL AUTHORITY EXISTS IN SUPPORT OF PETITIONERS' CONTENTION.**

In *Hague v. C. I. O.*, 101 Fed. (2d) 774, the United States Circuit Court of Appeals for the Third Circuit, in dealing with the question of whether the right to be secure from unlawful search and seizure was protected by the Fourteenth Amendment from state action said (all italics added):

"The Fourth Amendment to the Constitution of the United States provides, 'The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, * * *.' The right so protected is a fundamental civil right and in our opinion is a privilege of Federal citizenship. *As such it is secured against abridgment by the states by the privileges or immunities clause of the Fourteenth Amendment as well as by the due process clause of that Amendment.*" (p. 781.)

"* * * it is elementary that the Bill of Rights was designed as a curb upon the power of the Federal government which it was feared might encroach upon the rights of the states. We are unable to perceive any reason, however, why the right to be free from unreasonable searches and seizures set forth in the Fourth Amendment should not stand upon a parity today with freedom of religion, of speech, of the press and of assembly as guaranteed by the First Amendment. All of these rights are of equal importance to the individual and in our opinion they stand as pari materia.

"Liberty of the person, including freedom of locomotion, is, as we have seen, one of * * * the privileges or immunities of citizens of the United States * * * protected by the Fourteenth Amendment against abridgment by the States. Among those rights and liberties of which the states may not deprive the individual under the due process clause of that Amendment are freedom of speech, *Stromberg v. California*, 283 U. S. 359, 51 S. Ct. 332, 75 L. Ed. 1117, 73 A. L.

R. 1484, and freedom of the press, *Gitlow v. New York*, *supra*. *In our opinion freedom from unreasonable searches and seizures is included as well.*" (pp. 787-8.)

"It follows therefore that the fundamental civil rights secured to citizens of the United States by the First and Fourth Amendments are secured in the sense of being protected or guaranteed against interference by State action by the Fourteenth Amendment." (p. 788.)

(This court took over the above case but declined to pass on the question. [307 U. S. 496, 83 L. Ed. 1423.])

6. TIMELY MOTION TO SUPPRESS THE EVIDENCE HAVING BEEN MADE IN THE TRIAL COURT, THE CASE IS CONTROLLED BY THE DECISION IN *Weeks v. United States* AND NOT BY *Adams v. New York*.

Herein a motion to suppress and exclude the evidence obtained by the unlawful search and seizure was made in the trial court a reasonable time before trial. (T. 4.)

Respondent relies on the case of *Adams v. New York*, 192 U. S. 585, 24 S. Ct. 372, as authority for the action of the state court in denying the motion and admitting the evidence.

The *Adams case* was distinguished and partially overruled in the later case of *Weeks v. United States*, 232 U. S. 383, 58 L. ed. 652.

In the *Adams case*, a prosecution in the state court, it was held that a trial court would not stop the trial

to determine the manner in which competent evidence had been acquired by the state, that its only duty was to determine whether the offered evidence was competent. No motion prior to trial was made to suppress the evidence on the ground it had been procured by unlawful search and seizure, the objection being made for the first time at the trial when the evidence was offered by the state.

Shortly thereafter this court determined the *Weeks case*, which ever since has been the law. In the *Weeks case*, Weeks had seasonably moved the trial court for an order suppressing and ordering the return of property so unlawfully acquired. The trial court denied the motion. In holding such action erroneous this court pointed out the difference between the facts in the *Adams case* and the one under consideration and stated (all italics supplied) :

“While there is no opinion in the case, the court in this proceeding doubtless relied upon what is now contended by the government to be the correct rule of law under such circumstances, that the letters having come into the control of the court, it would not inquire into the manner in which they were obtained, but, if competent, would keep them and permit their use in evidence. Such proposition, the government asserts, is conclusively established by certain decisions of this court, the first of which is *Adams v. New York*, supra. * * * It was further held (in the *Adams case*), approving in that respect the doctrine laid down in 1 *Greenleaf*, Ev. 254a, that it was no valid objection to the use of the papers that they had been thus seized, and that the

courts *in the course of a trial* would not make an issue to determine that question, and many state cases were cited in support of that doctrine." (p. 395.)

This court then pointed out that in the *Adams case* there had been no objection prior to trial while in the *Weeks case* such an objection had been seasonably made prior to trial, whereupon, at page 396, it stated:

"It is therefore evident that the Adams Case affords no authority for the action of the court in this case, *when applied to in due season* for the return of papers seized in violation of the Constitutional Amendment."

The conclusion of this court appears on page 397 as follows:

"We therefore reach the conclusion that the letters were taken from the house of the accused by an official of the United States, acting under color of his office, in direct violation of the constitutional rights of the defendant; *that having made a reasonable application for their return*, which was heard and passed upon by the court, there was involved in the order refusing the application a denial of the constitutional rights of the accused * * *."

Here, reasonable application for the return of the evidence and its exclusion having been made, the case is controlled by the decision in the *Weeks case* and not by the *Adams case*.

Respondent has asserted that this court has already determined the question involved adversely to peti-

tioners, and bases this assertion on the fact that this court denied certiorari in *McIntyre v. Georgia*, 312 U. S. 695. There are two answers to this assertion.

First, it has always been our understanding that denial of certiorari does not constitute an affirmation by this court of any principle of law stated in the case below.

Second, the case of *McIntyre v. Georgia* falls within the rule announced in *Adams v. New York, supra*, while the present case falls within the rule announced in *Weeks v. United States, supra*.

CONCLUSION.

For each of the foregoing reasons petitioners represent that the question involved is of such import that this court should definitely determine it, and, to that end, that a rehearing be granted and the writ ordered issued as prayed.

Dated, San Francisco, California,
October 30, 1942.

Respectfully submitted,
LEO R. FRIEDMAN,
Attorney for Petitioners.

CERTIFICATE OF COUNSEL.

I hereby certify that I am attorney for petitioners in the above entitled cause and proceeding and that, in my judgment, the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition is not interposed for delay.

Dated, San Francisco, California,
October 30, 1942.

LEO R. FRIEDMAN,
Attorney for Petitioners.